

EC DIRECTIVES ON CROSS-BORDER
MERGERS AND PARENT/SUBSIDIARY
COMPANIES: CONVENTION FOR
ARBITRATION IN TRANSFER PRICING
DISPUTES

A CONSULTATIVE DOCUMENT

Representations would be welcome on the matters discussed in
this document.

They should be sent to:-

Gareth Norbury
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LONDON
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by 14 February 1992



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INTRODUCTION

1. In March, the Government announced that proposals to implement the three direct tax measures adopted by the EC Council of Ministers in July 1990 would be the subject of prior consultation.

2. The three measures are:

- a Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (90/434/EEC);
- a Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC); and
- a Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC).

3. The texts of the two Directives and the Convention are contained in the Annex to this consultative document. Additional copies may be obtained from HM Stationery Office (Official Journal of the European Communities - No. L225, 20 August 1990).

Scope and Content

4. This document sets out the Government's detailed proposals for the implementation of these measures. Draft clauses are included at the end of each relevant chapter. A commentary is also included which describes the effect of each clause. Subject to the outcome of consultations, it is proposed to introduce the necessary legislation at the earliest opportunity.

Compliance

5. It is not expected that these proposals will have any significant effect on business compliance costs. However, the Government would particularly welcome comments on the compliance aspects of the proposals.

Representations

6. Representations are invited on the proposals. They should be forwarded to:-

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to be received by 14 February 1992.

CHAPTER 1 : BACKGROUND

1.1 On 23 July 1990, the Economic and Finance Council of Ministers adopted three proposals to remove possible tax obstacles to Community-wide business activity and cross-border expansion. The measures are the Mergers Directive, to defer certain tax charges that could otherwise arise on a cross-border merger or demerger; the Parents/Subsidiaries Directive, to eliminate the double taxation of dividends and abolish withholding taxes on them when they are paid to a parent company in another Member State; and the Arbitration Convention, to set up a mechanism to resolve transfer pricing disputes between taxing authorities in different Contracting States.

1.2 The European Commission published in January an explanatory booklet concerning these three measures (entitled "Tax law and cross-border cooperation between companies" - January 1991:1-2/91). Copies may be obtained from HM Stationery Office.

Status of Directives and Convention

1.3 Under Community law, Directives are binding on Member States as to the results to be achieved, but require implementation in national law (Article 189 of the EEC Treaty).

1.4 The Arbitration Convention is a multilateral convention as opposed to a legislative act of the European Communities. The Contracting States are the Member States of the Community and, in order to be able to ratify the Convention, those States will have to adjust their legislation to comply with its terms.

Application to Gibraltar

1.5 The two directives are made under Article 100 of the Treaty of Rome. In the absence of a specific provision to the contrary in their terms, they are therefore to be applied to Gibraltar, by virtue of Gibraltar's status under Article 227(4) of the Treaty, as a territory for whose external relations a Member State (the United Kingdom) is responsible. Gibraltar is, however, excluded from the scope of the Arbitration Convention by virtue of Article 16(1).

1.6 Gibraltar is responsible for enacting its own domestic legislation implementing the two Directives and is currently in the process of doing so. Whether or not it does so, Gibraltar companies satisfying the requirements of the Directives are entitled to the benefit of their provisions from the date on which they come into force.

Commencement

1.7 In the case of the two Directives, it is proposed that the relevant United Kingdom legislation will apply from 1 January 1992, the date on which the Directives come into force.

1.8 The Arbitration Convention enters into force three months after it has been ratified by all Member States and is concluded for an initial period of five years. Although certain parts of the Convention require implementing in United Kingdom law, the date from which the provisions will apply will depend on how soon Member States ratify the Convention.

CHAPTER 2 : MERGERS DIRECTIVE

2.1 In broad terms, the Mergers Directive aims to allow companies from different Member States to merge or demerge their business operations without triggering immediate charges on capital gains. The Directive is concerned with four specific types of cross-border operation - mergers, divisions, transfers of assets and share exchanges. There are special provisions in the case of the transfer of a permanent establishment. The Directive comes into force on 1 January 1992.

Mergers and Divisions

2.2 In 1985, the European Commission put forward a proposal for a Tenth Company Law Directive which would harmonise the company law treatment of cross-border mergers involving public limited companies. The proposed European Company Statute (ECS) also makes provision for such mergers. However, neither the Tenth Directive nor the ECS has yet been agreed; and no such proposals have been made in the case of cross-border divisions. In the absence of such measures, it is not clear how far it would be feasible to carry out such operations which would necessarily involve the laws of more than one Member State. They are not specifically provided for under United Kingdom company law and the Government has no evidence that they have ever been carried out or even attempted. Accordingly, it is proposed to defer introducing the necessary tax changes for these operations until company law in the United Kingdom provides for them.

Transfer of assets

2.3 Article 2(c) of the Directive defines a "transfer of assets" as

"an operation whereby a company transfers without being dissolved all or one or more branches of its activity

to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer."

From the point of view of the United Kingdom, Article 2(c) is aimed at the situation where a United Kingdom resident company transfers some or all of its United Kingdom operations to a company resident in another Member State in exchange for securities issued by that other company. Article 4 of the Directive (which applies to transfers of assets by virtue of Article 9) requires the United Kingdom to defer any capital gains charges on the assets transferred, although deferral is only available where the transferee company will be fully exposed to United Kingdom tax when it subsequently disposes of the assets received (clauses A and E).

2.4 Some commentators have suggested that the expression in Article 2(c) "securities representing the capital of" does not include debt instruments. This is also the Government's view. However, in practice this requirement could be unduly restrictive. Accordingly, with the exception of qualifying corporate bonds, which are exempt from capital gains tax, it is also proposed to allow relief for a transfer of assets wholly or partly in exchange for secured debt.

2.5 It has also been suggested that the provisions of Article 4 apply to capital allowance balancing charges. In the Government's view the position is by no means free from doubt. Nevertheless, it is proposed to provide for the deferment of these charges on the basis that they may be within the scope of the Directive (clause B).

Permanent Establishment

2.6 Leaving aside mergers and divisions, Article 10 of the Directive is concerned with the "special case" where the assets transferred in a transfer of assets constitute or

include a permanent establishment of the transferring company in another Member State and those assets are transferred to a company of a third Member State. Consequently, the permanent establishment becomes a permanent establishment of the company of the third Member State.

2.7 One of the requirements of Article 10 is that where a company resident in one Member State transfers a permanent establishment situated in the United Kingdom to a company resident in a third Member State Article 4 applies to defer any capital gains charges on the assets transferred (clauses A and E).

2.8 The remainder of Article 10, as far as the United Kingdom is concerned, deals with the situation where a United Kingdom company has a permanent establishment situated in another Member State and transfers it to a company resident in a third Member State in exchange for securities in the transferee company. An existing relief (Section 268A, ICTA 1970) already postpones capital gains charges accruing in these circumstances. This relief will be retained. However, under Article 10(2), the United Kingdom can tax gains or other profits resulting from the transfer of the permanent establishment, but is required to give relief for the tax that would have been payable in the Member State where the permanent establishment is situated but for the provisions of the Directive; the United Kingdom is not required to give relief for any other foreign tax (clauses C, D and E). Companies will be able to claim relief under either Section 268A, ICTA 1970 or the new provision.

Exchanges of Shares

2.9 Article 8 of the Directive defers capital gains charges which would otherwise accrue on an exchange of shares. For this purpose, Article 2(d) defines an exchange of shares as

an operation

"whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange."

2.10 The United Kingdom already has provisions which, subject to certain conditions, defer capital gains charges on share exchanges (Section 85, CGTA 1979 in conjunction with sections 78-81). However, there could be some cases which, although within Article 2(d), would not satisfy the present requirements of Section 85. Accordingly, it is proposed to extend Section 85 so that deferral of tax will also be available where the acquiring company holds - or as a result of the exchange will hold - the greater part of the voting power in the other company (clause F). So as not to favour cross-border operations, the extension of Section 85 will also apply to domestic share exchanges.

2.11 In other respects, the relief required by the Directive is narrower than relief under Section 85, CGTA 1979. For example, the latter applies to debentures as well as shares and unlike the Directive there is no limit on the amount of cash consideration that can also be offered to the shareholders in the acquired company. However, with the exception of the change outlined in paragraph 2.10 above it is not proposed to amend Section 85 further.

2.12 It is possible that Article 8 would preclude the tax charge which can arise on the trustees of an Employee Share Ownership Trust (ESOT) as a result of a share for share exchange (Sections 68 and 69(1)(a), Finance Act 1989). It

is proposed, therefore that this charge should be lifted.
As with the extension of Section 85, CGTA 1979
(paragraph 2.10 above) this change will apply in both
cross-border and domestic situations (clause G).

Informal application of provisions pending enactment

2.13 The Directive enters into force on 1 January 1992 and under Community law it is likely that companies will be able to rely on its provisions notwithstanding the absence of implementing legislation in the United Kingdom. Accordingly, it is proposed that in appropriate cases the draft clauses included at the end of this chapter will be applied in practice pending enactment of the legislation. In the first instance, all correspondence giving full details of the proposed transactions including the names of the companies involved should be addressed to:-

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CLAUSE A: TRANSFER OF A UK TRADE: CAPITAL GAINS

This clause gives effect to Article 4 of the Directive in respect of corporation tax on chargeable gains. It applies where a company resident in one Member State transfers all or part of its UK trading operations to a company resident in another Member State in exchange for securities issued by the transferee company. It requires the UK to defer capital gains charges on the assets transferred provided that the transferee company remains exposed to UK tax when it subsequently disposes of the assets received.

CLAUSE B: TRANSFER OF A UK TRADE: CAPITAL ALLOWANCES

This clause defers capital allowance balancing charges and other balancing adjustments where clause A applies.

CLAUSE C: TRANSFER OF A NON UK TRADE

This clause concerns the situation where a UK resident company transfers a branch or agency situated in another Member State to a company resident in a third Member State. It, together with clause D, gives effect to Article 10(2). This permits the UK to tax gains accruing on the transfer subject to giving relief for any tax that, but for the Directive, would have been payable in the Member State where the branch or agency is situated.

CLAUSE D: TRANSFER OF A NON UK TRADE - DOUBLE TAXATION RELIEF

In relation to clause C, this clause provides for double taxation relief on the basis of the tax that would, but for the Directive, have been payable in the member State where the branch or agency is situated. It determines the basis upon which the "notional" tax should be calculated and allowed against UK tax.

CLAUSE E: TRANSFER OF TRADE: SUPPLEMENTARY

This clause introduces amendments to existing legislation which are consequential upon clauses A and C.

CLAUSE F: CGT: EXCHANGE OF SECURITIES - MISCELLANEOUS

Article 8 of the Directive defers capital gains charges which would otherwise accrue on an exchange of shares as defined by Article 2(d). The UK CGT code already provides for such deferral subject to certain conditions (these are contained in Section 85, CGTA 1979). However, in some circumstances, the provisions of Section 85 would not meet the requirements of the Directive. This clause therefore amends Section 85 to embrace the definition in Article 2(d) - applying the extension for both cross-border and domestic share exchanges.

CLAUSE G: EMPLOYEE SHARE OWNERSHIP TRUSTS

It is possible that Article 8 of the Directive would preclude the tax charge which can arise on the trustees of an Employee Share Ownership Trust as a result of a share for share exchange. The clause removes this charge in both cross-border and domestic situations.

Capital gains

The following shall be inserted after section 269 of the Income and Corporation Taxes Act 1970—

Transfer of a UK trade.

“Transfers concerning companies of different member States

Transfer of a UK trade.

269A.—(1) This section applies where—

- (a) a qualifying company resident in one member State (company A) transfers the whole or part of a trade carried on by it in the United Kingdom to a qualifying company resident in another member State (company B),
- (b) the transfer is wholly in exchange for securities issued by company B to company A,
- (c) the transfer takes effect on or after 1st January 1992,
- (d) a claim is made under this section by company A and company B,
- (e) section 269B below does not prevent this section applying,
- (f) the first condition is met in relation to company B immediately after the time of the transfer, and
- (g) if company A is resident in the United Kingdom at the time of the transfer, the second condition and (if it applies) the third condition is met immediately after the time of the transfer.

(2) Where immediately after the time of the transfer company B is not resident in the United Kingdom, the first condition is that were it to dispose of the assets included in the transfer any chargeable gains accruing to it on the disposal would form part of its chargeable profits for corporation tax purposes by virtue of section 11(2)(b) of the Taxes Act 1988.

(3) Where immediately after the time of the transfer company B is resident in the United Kingdom, the first condition is that none of the assets included in the transfer is one in respect of which, by virtue of the asset being of a description specified in double taxation relief arrangements, the company falls to be regarded for the purposes of the arrangements as not liable in the United Kingdom to tax on gains accruing to it on a disposal.

(4) The second condition is that none of the securities issued in exchange for the transfer is a qualifying corporate bond for the purposes of section 64 of the Finance Act 1984.

(5) The third condition applies if immediately after the time of the transfer company A falls to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom; and the condition is that none of the securities issued in exchange for the transfer is an asset in respect of which the company falls to be regarded for the purposes of the arrangements as not liable in the United Kingdom to tax on gains accruing to it on a disposal.

(6) Where this section applies—

(a) the two companies shall be treated, so far as relates to corporation tax on chargeable gains, as if any assets included in the transfer were acquired by company B from company A for a consideration of such amount as would secure that on the disposal by way of transfer neither a gain nor a loss would accrue to company A;

(b) section 127(3) of the Finance Act 1989 (deemed disposal at market value) shall not apply to any such assets by reason of the transfer (if it would apply apart from this paragraph).

(7) For the purposes of subsection (1)(a) above, a company shall be regarded as resident in a member State if it is within a charge to tax under the law of the State because it is regarded as resident for the purposes of the charge.

(8) For the purposes of subsection (7) above, a company shall be treated as not within a charge to tax under the law of a member State if it falls to be regarded for the purposes of any double taxation relief arrangements to which the State is a party as resident in a territory which is not within any of the member States.

(9) In this section—

“qualifying company” means a body incorporated under the law of a member State;

“securities” includes shares.

Section 269A:
anti-avoidance.

269B.—(1) Section 269A above shall not apply unless the transfer of the trade or part is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to income tax, corporation tax or capital gains tax.

(2) Subsection (1) above shall not apply where, before the transfer, the Board have on the application of company A and company B notified those



companies that the Board are satisfied that the transfer will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in that subsection.

5

(3) Subsections (2) to (5) of section 88 of the Capital Gains Tax Act 1979 shall have effect in relation to subsection (2) above as they have effect in relation to subsection (1) of that section."

Capital allowances

The following section shall be inserted after section 152A of the Capital Allowances Act 1990—

5 “Transfer of a UK trade. 152B.—(1) This section applies where section 269A of the Income and Corporation Taxes Act 1970 applies; and references in this section to company A, company B and the transfer shall be construed accordingly.

10 (2) Where this section applies the first and second rules set out in subsections (3) and (4) below shall have effect.

(3) The first rule is that the transfer itself shall not be treated as giving rise to any allowances or charges under the Capital Allowances Acts.

15 (4) The second rule applies with regard to anything done after the transfer in relation to the assets included in it; and the rule is that everything done to or by company A in relation to those assets before the transfer shall for the purposes of the Capital Allowances Acts be treated as having been done to or by company B (and not company A).

20 (5) Where for the purposes of subsection (4) above expenditure falls to be apportioned between assets included in the transfer and other assets, the apportionment shall be made in such manner as is just and reasonable.

25 (6) Any question which arises as to the manner in which an apportionment referred to in subsection (5) above is to be made shall be determined, for the purposes of the tax of both company A and company B—

30 (a) in a case where the same body of General Commissioners have jurisdiction with respect to both the companies, by those Commissioners, unless the companies agree that it shall be determined by the Special Commissioners;

35 (b) in a case where different bodies of General Commissioners have jurisdiction with respect to the companies, by such of those bodies as the Board may direct, unless the companies agree that it shall be determined by the Special Commissioners;

40 (c) in any other case, by the Special Commissioners.

45 (7) The Commissioners by whom the question referred to in subsection (6) above falls to be

determined shall make the determination in like manner as if it were an appeal except that company A and company B shall be entitled to appear and be heard by those Commissioners or to make representations to them in writing.

5

(8) Section 343(2) of the principal Act shall not apply as regards a case in relation to which a claim is made under section 269A of the Income and Corporation Taxes Act 1970."

—The following sections shall be inserted after section 269B of the Income and Corporation Taxes Act 1970—

Transfer of a non-UK trade.

“Transfer of a non-UK trade.

269C.—(1) This section applies where—

- (a) a qualifying company resident in the United Kingdom (company A) transfers to a qualifying company resident in another member State (company B) the whole or part of a trade which, immediately before the time of the transfer, company A carried on in a third member State through a branch or agency,
- (b) the transfer includes the whole of the assets of company A used for the purposes of the trade or part (or the whole of those assets other than cash),
- (c) the transfer is wholly or partly in exchange for securities issued by company B to company A,
- (d) the aggregate of the chargeable gains accruing to company A on the transfer exceeds the aggregate of the allowable losses so accruing,
- (e) the transfer takes effect on or after 1st January 1992,
- (f) a claim is made under this section by company A, and
- (g) section 269D below does not prevent this section applying.

(2) The Capital Gains Tax Act 1979 shall have effect in accordance with subsection (3) below.

(3) The allowable losses accruing to company A on the transfer shall be set off against the chargeable gains so accruing and the transfer shall be treated as giving rise to a single chargeable gain equal to the aggregate of those gains after deducting the aggregate of those losses.

(4) No claim may be made under this section as regards a transfer in relation to which a claim is made under section 268A above.

(5) In a case where this section applies, section 815A of the Taxes Act 1988 shall also apply.

(6) For the purposes of subsection (1)(a) above—

- (a) a company shall not be regarded as resident in the United Kingdom if it falls to be regarded for the purposes of any double taxation relief arrangements to which the United Kingdom is a party as resident in a territory which is not within any of the member States;

(b) a company shall be regarded as resident in another member State if it is within a charge to tax under the law of the State because it is regarded as resident for the purposes of the charge.

5

(7) For the purposes of subsection (6)(b) above, a company shall be treated as not within a charge to tax under the law of a member State if it falls to be regarded for the purposes of any double taxation relief arrangements to which the State is a party as resident in a territory which is not within any of the member States.

(8) Section 442(3) of the Taxes Act 1988 (overseas business of UK insurance companies) shall be ignored in arriving at the chargeable gains accruing to company A on the transfer, and the allowable losses so accruing, for the purposes of subsections (1)(d) and (3) above..

(9) In this section—

“qualifying company” means a body incorporated under the law of a member State;

“securities” includes shares.

Section 269C:
anti-avoidance.

269D.—(1) Section 269C above shall not apply unless the transfer of the trade or part is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to income tax, corporation tax or capital gains tax.

(2) Subsection (1) above shall not apply where, before the transfer, the Board have on the application of company A notified that company that the Board are satisfied that the transfer will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in that subsection.

(3) Subsections (2) to (5) of section 88 of the Capital Gains Tax Act 1979 shall have effect in relation to subsection (2) above as they have effect in relation to subsection (1) of that section.”

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Double taxation relief

The following section shall be inserted after section 815 of the Taxes Act 1988—

Transfer of a non-UK trade.

- “Transfer of a non-UK trade. 815A.—(1) This section applies where section 269C of the 1970 Act applies; and references in this section to company A, the transfer and the trade shall be construed accordingly.
- (2) Where company A produces to the inspector an appropriate certificate given by the tax authorities of the relevant member State, this Part, including any arrangements having effect by virtue of section 788, shall apply as if the amount stated in the certificate in accordance with subsection (3)(b) below were tax payable under the law of the relevant member State.
- (3) For the purposes of subsection (2) above, an appropriate certificate is one containing—
- (a) a statement to the effect that gains accruing to company A on the transfer would have been chargeable to tax under the law of the relevant member State but for the Mergers Directive;
 - (b) a statement of the amount of tax which would have been payable under that law in respect of the gains so accruing but for that Directive; and
 - (c) a statement to the effect that that amount has been computed on the required basis.
- (4) For the purposes of subsection (3)(c) above, the required basis is that—
- (a) so far as permitted under the law of the relevant member State, any losses arising on the transfer are set against any gains so arising, and
 - (b) any relief available to company A under that law has been duly claimed.
- (5) In this section—
- “the Mergers Directive” means the Directive of the Council of the European Communities dated 23rd July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member States (no. 90/434/EEC);
 - “relevant member State” means the member State in which, immediately before the time of the transfer, company A carried on the trade through a branch or agency.”

—(1) In section 268A of the Income and Corporation Taxes Act 1970 (transfer of assets to non-resident company) the following subsection shall be inserted after subsection (6)—

Transfer of
trade: supple-
mentary.

5 “(6A) No claim may be made under this section as regards a transfer in relation to which a claim is made under section 269C below.”

(2) In section 275 of that Act (disposal or acquisition outside a group)—

10 (a) in subsection (1A) after the word “section” (in the first place where it occurs) there shall be inserted “269A,”;

(b) in subsection (1B) after “section” there shall be inserted “269A,”.

(3) In section 281(2) of that Act (dividend stripping) after “which section” there shall be inserted “269A,”.

15 (4) In paragraph 10(2) of Schedule 13 to the Finance Act 1984 (qualifying corporate bonds) after paragraph (bb) there shall be inserted—

20 “(bc) section 269A of the Taxes Act (transfer of United Kingdom trade between companies of different member States); or”.

(5) In section 68(7A)(b) of the Finance Act 1985 (indexation) after “267,” there shall be inserted “269A,”.

(6) In paragraph 1(3)(b) of Schedule 8 to the Finance Act 1988 (re-basing) after “267,” there shall be inserted “269A,”.

25 (7) In paragraph 5 of Schedule 11 to that Act (indexation)—

(a) after “section” there shall be inserted “269A,”;

(b) the word “intra-group” shall be omitted;

(c) for “either” there shall be substituted “one”.

30 (8) Subsections (2) and (3) above apply where the transfer referred to in section 269A takes effect on or after 1st January 1992.

(9) Subsections (4) to (6) above apply to any disposal by way of transfer where the transfer takes effect on or after 1st January 1992.

35 (10) Subsection (7) above applies where any disposal to which section 269A applies is by way of a transfer taking effect on or after 1st January 1992.

CLAUSE F

Miscellaneous

—(1) In section 85 of the Capital Gains Tax Act 1979 (exchange of securities for those in another company) in subsection (1), after paragraph (b) there shall be inserted "or

CGT: exchange of securities.

- 5 (c) company A holds, or in consequence of the exchange will hold, the greater part of the voting power in company B".

(2) This section applies in relation to exchanges made on or after 1st January 1992.

CLAUSE G

—(1) In section 69 of the Finance Act 1989 (chargeable events as regards employee share ownership trusts) the following shall be inserted after subsection (3)—

Employee share ownership trusts.

- 5 "(3A) For the purposes of subsection (1)(a) above a transfer is also a qualifying transfer if it is made by way of exchange in circumstances mentioned in section 85(1) of the Capital Gains Tax Act 1979."

(2) This section applies in relation to exchanges made on or after 1st January 1992.

3.1 The Parent/Subsidiary Companies Directive eliminates double taxation of dividends flowing from a subsidiary company in one Member State to a parent company in another and abolishes withholding taxes on such dividends. It achieves this by exempting such dividends in the hands of the parent or by requiring the parent company State to allow relief for tax paid in the subsidiary State on profits out of which dividends are paid. The Directive comes into force on 1 January 1992.

3.2 Article 3(1) of the Directive attributes parent company status to any company of a Member State which has a minimum holding of 25% in the capital of a company of another Member State (the subsidiary). However, Article 3(2) permits Member States to replace this criterion by that of a holding of voting rights.

3.2 The United Kingdom does not impose any withholding tax on dividends. Moreover, the United Kingdom already allows relief for foreign tax on underlying profits out of which dividends are paid. This relief is invariably available by reference to a minimum voting rights test (commonly 10%).

3.3 In the Government's view, therefore, United Kingdom law already achieves the principal results required by the Directive. However, Article 6 provides that

"The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary."

Accordingly, it will be necessary to disapply the rules for collecting and paying agents in Section 123, ICTA 1988 for those cases within the scope of the Directive even though these charges probably do not arise in practice. In order to make this change easier to administer for both Revenue and taxpayers alike, it is proposed to extend the

disapplication of these rules required by Article 6 to dividends received by United Kingdom parent companies from subsidiaries in any overseas country. These provisions will apply where the United Kingdom company receiving the dividend directly or indirectly controls not less than 10% of the voting power in the company paying the dividend (clause H). As with the Mergers Directive (paragraph 2.13), it is proposed that the draft legislation will be applied in practice pending enactment.

Tax Credits

3.4 Under the United Kingdom imputation system of corporation tax, tax credits are generally only payable to United Kingdom residents. However, subject to abatement, tax credits may be payable to non-residents, either in whole or in part, in accordance with the terms of a double taxation agreement. Some commentators have raised the question of whether the Directive affects the abatement of tax credits in these circumstances.

3.5 Article 7(2) of the Directive provides

"This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends."

In the Government's view the expression "provisions relating to the payment of tax credits" in that paragraph refers to all the provisions of double taxation agreements relating to the calculation and payment of tax credits, including the provisions requiring a deduction from the amount of the dividend and tax credit payable in respect of tax charged in the United Kingdom. Accordingly, arrangements for the payment of tax credit under double taxation agreements are outside the scope of the Directive.

Clause H excludes from the charge on both paying and collecting agents dividends paid by a company which is not resident in the UK to a company which is UK resident provided that the latter company either directly or indirectly controls not less than 10% of the voting power in the former company.

CLAUSE H

In section 123 of the Taxes Act 1988 (foreign dividends) the following subsections shall be inserted after subsection (6)— Foreign dividends.

“(7) In a case where—

5 (a) relevant foreign dividends referred to in subsection (2) above are dividends (as opposed to interest or other annual payments),

(b) they are entrusted by a company which at the time they are entrusted (the relevant time) is not resident in the United Kingdom,

10 (c) they are entrusted for payment to a company which at the relevant time is resident in the United Kingdom,

(d) at the relevant time the company mentioned in paragraph (c) above directly or indirectly controls not less than 10 per cent. of the voting power in the company mentioned in paragraph (b) above, and

15 (e) the relevant time falls on or after 1st January 1992, subsection (2) above shall not apply.

(8) In a case where—

20 (a) foreign dividends referred to in subsection (3)(a) above are dividends (as opposed to interest or other annual payments),

(b) they are paid by a company which at the time of the payment (the relevant time) is not resident in the United Kingdom,

25 (c) payment is obtained on behalf of a company which at the relevant time is resident in the United Kingdom,

(d) at the relevant time the company mentioned in paragraph (c) above directly or indirectly controls not less than 10 per cent. of the voting power in the company mentioned in paragraph (b) above, and

30 (e) the relevant time falls on or after 1st January 1992, subsection (3) above shall not apply.”

CHAPTER 4 : ARBITRATION CONVENTION

4.1 The Arbitration Convention is concerned with the situation where conditions between two associated enterprises differ from those which would be made between independent enterprises. In these circumstances, any profits which would have accrued to one of the enterprises but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly (Article 4). Similar provisions apply to permanent establishments (branches) of enterprises. These provisions are similar to those contained in the United Kingdom's bilateral agreements with other member states and in addition to the general provisions of Section 788, ICTA 1988 giving effect to the provisions of bilateral agreements, Section 770, ICTA 1988 provides for similar adjustments to be made under domestic law. Such adjustments are commonly known as "transfer pricing" adjustments.

4.2 The Arbitration Convention's main purpose is to prevent double taxation arising when transfer pricing adjustments are made. The United Kingdom's bilateral agreements permit the Competent Authorities of treaty partners to make downward adjustments or to give relief for the extra tax caused by a transfer pricing adjustment so that the same profits are in effect not taxed twice. Such adjustments are known as "corresponding" adjustments. The Convention seeks to achieve this objective by giving an enterprise affected by a transfer pricing adjustment a right to present its case to the Competent Authority (normally of its own country) if it believes that that or another taxing jurisdiction has not observed the internationally accepted "arm's length" principle described in Article 4 of the Convention and outlined above. The Competent Authority may then resolve the case either unilaterally or by mutual agreement with the Competent Authority of any other State concerned (Article 6). If agreement cannot be reached then the Competent Authorities are required by Article 7 to set up an

Advisory Commission to deliver its opinion on the elimination of the double taxation in question. States are entitled (by mutual agreement) to take a decision which eliminates double taxation by some other means, but in the absence of such mutual agreement are obliged to follow the Advisory Commission's opinion.

4.3 Legislation will be necessary to implement certain parts of the Convention in the United Kingdom. (Clause I).

4.4 The application of the Convention will raise a number of important procedural and administrative issues. It is proposed that these aspects should be the subject of separate consultations with interested parties in due course.

DRAFT CLAUSES: ARBITRATION CONVENTION

Clause I contains the provisions necessary to implement the Arbitration Convention. These provisions

- require the Board of Inland Revenue to give effect to the elimination of double taxation in accordance with the Convention;
- override time limits for the making of assessments and claims to relief;
- provide for the Board, or any authorised officer of the Board, to disclose information required to be disclosed under the Convention in pursuance of a request made by an advisory commission; and
- penalise any breach of secrecy obligations by a member of an advisory commission.

—(1) The following section shall be inserted after section 815A of the Taxes Act 1988—

“The Arbitration Convention. 815B.—(1) Subsection (2) below applies if the Arbitration Convention requires the Board to give effect to—

(a) an agreement or decision, made under the Convention by the Board (or their authorised representative) and any other competent authority, on the elimination of double taxation, or

(b) an opinion, delivered by an advisory commission set up under the Convention, on the elimination of double taxation.

(2) The Board shall give effect to the agreement, decision or opinion notwithstanding anything in any enactment; and any such adjustment as is appropriate in consequence may be made (whether by way of discharge or repayment of tax, the making of an assessment or otherwise).

(3) Section 43(1) of the Management Act (time limit for making claims) shall not apply to a claim made in pursuance of an agreement, decision or opinion falling within subsection (1)(a) or (b) above.

(4) In this section “the Arbitration Convention” means the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, concluded on 23rd July 1990 by the parties to the treaty establishing the European Economic Community (90/463/EEC).”

(2) In section 816 of the Taxes Act 1988 (disclosure of information) the following subsection shall be inserted after subsection (2)—

“(2A) The obligation as to secrecy imposed by any enactment shall not prevent the Board, or any authorised officer of the Board, from disclosing information required to be disclosed under the Arbitration Convention in pursuance of a request made by an advisory commission set up under that Convention; and “the Arbitration Convention” here has the meaning given by section 815B(4).”

(3) The following section shall be inserted after section 182 of the Finance Act 1989 (disclosure of information)—

“Double taxation: disclosure of information. 182A.—(1) A person who discloses any information acquired by him in the exercise of his functions as a member of an advisory commission set up under the Arbitration Convention is guilty of an offence.

(2) Subsection (1) above does not apply to any disclosure of information—

- (a) with the consent of the person who supplied the information to the commission, or
 - (b) which has been lawfully made available to the public before the disclosure is made.
- (3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence he believed that the information in question had been lawfully made available to the public before the disclosure was made and had no reasonable cause to believe otherwise. 5 10
- (4) A person guilty of an offence under this section is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both; 15
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.
- (5) No prosecution for an offence under this section shall be instituted in England and Wales or in Northern Ireland except— 20
- (a) by the Board, or
 - (b) by or with the consent of the Director of Public Prosecutions or, in Northern Ireland, the Director of Public Prosecutions for Northern Ireland. 25
- (6) In this section—
- “the Arbitration Convention” has the meaning given by section 815B(4) of the Taxes Act 1988; 30
 - “the Board” means the Commissioners of Inland Revenue.”

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

(90/434/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal of the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; whereas it is necessary to remove such disadvantages;

Whereas it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

Whereas in respect of mergers, divisions or transfers of assets, such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company;

Whereas the system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the State of the transferring company at the date of their disposal;

Whereas it is also necessary to define the tax regime applicable to certain provisions, reserves or losses of the transferring company and to solve the tax problems occurring where one of the two companies has a holding in the capital of the other;

Whereas the allotment to the shareholders of the transferring company of securities of the receiving or acquiring company would not in itself give rise to any taxation in the hands of such shareholders;

⁽¹⁾ OJ No C 39, 22. 3. 1969, p. 1.

⁽²⁾ OJ No C 51, 29. 4. 1970, p. 12.

⁽³⁾ OJ No C 100, 1. 8. 1969, p. 4.

Whereas it is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation has as its objective tax evasion or avoidance or results in a company, whether or not it participates in the operation, no longer fulfilling the conditions required for the representation of employees in company organs,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

Each Member State shall apply this Directive to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved.

Article 2

For the purposes of this Directive:

- (a) 'merger' shall mean an operation whereby:
- one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company in exchange for the issue to their shareholders of securities representing the capital of that other company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities,
 - two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, in exchange for the issue to their shareholders of securities representing the capital of that new company, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities,
 - a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities representing its capital;
- (b) 'division' shall mean an operation whereby a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more existing or new companies, in exchange for the pro rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

- (c) 'transfer of assets' shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;
- (d) 'exchange of shares' shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10 % of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;
- (e) 'transferring company' shall mean the company transferring its assets and liabilities or transferring all or one or more branches of its activity;
- (f) 'receiving company' shall mean the company receiving the assets and liabilities or all or one or more branches of the activity of the transferring company;
- (g) 'acquired company' shall mean the company in which a holding is acquired by another company by means of an exchange of securities;
- (h) 'acquiring company' shall mean the company which acquires a holding by means of an exchange of securities;
- (i) 'branch of activity' shall mean all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.

Article 3

For the purposes of this Directive, 'company from a Member State' shall mean any company which:

- (a) takes one of the forms listed in the Annex hereto;
- (b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
- (c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
- impôt des sociétés/vennootschapsbelasting in Belgium,
 - selskabsskat in Denmark,
 - Körperschaftsteuer in the Federal Republic of Germany,
 - φόρος εισοδήματος νομικών προσώπων κερδοσκοπού χαρακτήρα, in Greece,
 - impuesto sobre sociedades in Spain,
 - impôt sur les sociétés in France,
 - corporation tax in Ireland,
 - imposta sul reddito delle persone giuridiche in Italy,

- impôt sur le revenu des collectivités in Luxembourg,
- vennootschapsbelasting in the Netherlands,
- imposto sobre o rendimento das pessoas colectivas in Portugal,
- corporation tax in the United Kingdom,

or to any other tax which may be substituted for any of the above taxes.

TITLE II

Rules applicable to mergers, divisions and exchanges of shares

Article 4

1. A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. The following expressions shall have the meanings assigned to them:

- value for tax purposes: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it,
- transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.

2. The Member States shall make the application of paragraph 1 conditional upon the receiving company's computing any new depreciation and any gains or losses in respect of the assets and liabilities transferred according to the rules that would have applied to the transferring company or companies if the merger or division had not taken place.

3. Where, under the laws of the Member State of the transferring company, the receiving company is entitled to have any new depreciation or any gains or losses in respect of the assets and liabilities transferred computed on a basis different from that set out in paragraph 2, paragraph 1 shall not apply to the assets and liabilities in respect of which that option is exercised.

Article 5

The Member States shall take the necessary measures to ensure that, where provisions or reserves properly constituted by the transferring company are partly or wholly exempt from tax and are not derived from permanent establishments abroad, such provisions or reserves may be carried over, with the same tax exemption, by the permanent

establishments of the receiving company which are situated in the Member State of the transferring company, the receiving company thereby assuming the rights and obligations of the transferring company.

Article 6

To the extent that, if the operations referred to in Article 1 were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory.

Article 7

1. Where the receiving company has a holding in the capital of the transferring company, any gains accruing to the receiving company on the cancellation of its holding shall not be liable to any taxation.

2. The Member States may derogate from paragraph 1 where the receiving company's holding in the capital of the transferring company does not exceed 25%.

Article 8

1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

2. The Member States shall make the application of paragraph 1 conditional upon the shareholder's not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the merger, division or exchange.

The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.

In this paragraph the expression 'value for tax purposes' means the amount on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.

3. Where, under the law of the Member State in which he is resident, a shareholder may opt for tax treatment different from that set out in paragraph 2, paragraph 1 shall not apply to the securities in respect of which such an option is exercised.

4. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account when taxing shareholders any cash payment that may be made on the merger, division or exchange.

TITLE III

Rules applicable to transfers of assets

Article 9

The provisions of Articles 4, 5 and 6 shall apply to transfers of assets.

TITLE IV

Special case of the transfer of a permanent establishment

Article 10

1. Where the assets transferred in a merger, a division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the latter State shall renounce any right to tax that permanent establishment. However, the State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered. The State in which the permanent establishment is situated and the State of the receiving company shall apply the provisions of this Directive to such a transfer as if the former State were the State of the transferring company.

2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing world-wide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.

TITLE V

Final provisions

Article 11

1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III

and IV where it appears that the merger, division, transfer of assets or exchange of shares:

- (a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;
- (b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.

2. Paragraph 1 (b) shall apply as long as and to the extent that no Community law provisions containing equivalent rules on representation of employees on company organs are applicable to the companies covered by this Directive.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 1992 and shall forthwith inform the Commission thereof.

2. By way of derogation from paragraph 1, the Portuguese Republic may delay the application of the provisions concerning transfers of assets and exchanges of shares until 1 January 1993.

3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

This Directive is addressed to the Member States.

Done at Brussels, 23 July 1990.

For the Council
The President
G. CARLI

ANNEX

List of companies referred to in Article 3 (a)

- (a) companies under Belgian law known as 'société anonyme' / 'naamloze vennootschap', 'société en commandite par actions' / 'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée' / 'besloten vennootschap met beperkte aansprakelijkheid' and those public law bodies that operate under private law;
- (b) companies under Danish law known as: 'aktieselskab', 'anpartsselskab';
- (c) companies under German law known as: 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'bergrechtliche Gewerkschaft';
- (d) companies under Greek law known as: 'ανώνυμη εταιρεία';
- (e) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada' and those public law bodies which operate under private law;
- (f) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée' and industrial and commercial public establishments and undertakings;
- (g) the companies in Irish law known as public companies limited by shares or by guarantee, private companies limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts or building societies registered under the Building Societies Acts;
- (h) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', and public and private entities carrying on industrial and commercial activities;
- (i) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée';
- (j) companies under Dutch law known as: 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid';
- (k) commercial companies or civil law companies having a commercial form as well as other legal persons carrying on commercial or industrial activities, which are incorporated in accordance with Portuguese law;
- (l) companies incorporated under the law of the United Kingdom.

COUNCIL DIRECTIVE

of 23 July 1990

on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(90/435/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal of the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas it is therefore necessary to introduce with respect to such grouping together of companies of different Member States, tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas such grouping together may result in the formation of groups of parent companies and subsidiaries;

Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;

Whereas where a parent company by virtue of its association with its subsidiary receives distributed profits, the State of the parent company must:

— either refrain from taxing such profits,

— or tax such profits while authorizing the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits;

Whereas it is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax; whereas, however, the Federal Republic of Germany and the Hellenic Republic, by reason of the particular nature of their corporate tax systems, and the Portuguese Republic, for budgetary reasons, should be authorized to maintain temporarily a withholding tax,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. Each Member State shall apply this Directive:

- to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,
 - to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.
2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

Article 2

For the purposes of this Directive 'company of a Member State' shall mean any company which:

- (a) takes one of the forms listed in the Annex hereto;
- (b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
- (c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
 - impôt des sociétés/vennootschapsbelasting in Belgium,
 - selskabsskat in Denmark,
 - Körperschaftsteuer in the Federal Republic of Germany,

⁽¹⁾ OJ No C 39, 22. 3. 1969, p. 7 and Amendment transmitted on 5 July 1985.

⁽²⁾ OJ No C 51, 29. 4. 1970, p. 6.

⁽³⁾ OJ No C 100, 1. 8. 1969, p. 7.

- φόρος εισοδήματος νομικών προσώπων κερδοσκοπικού χαρακτήρα in Greece,
- impuesto sobre sociedades in Spain,
- impôt sur les sociétés in France,
- corporation tax in Ireland,
- imposta sul reddito delle persone giuridiche in Italy,
- impôt sur le revenu des collectivités in Luxembourg,
- vennootschapsbelasting in the Netherlands,
- imposto sobre o rendimento das pessoas colectivas in Portugal,
- corporation tax in the United Kingdom,

or to any other tax which may be substituted for any of the above taxes.

Article 3

1. For the purposes of applying this Directive,
 - (a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25 % in the capital of a company of another Member State fulfilling the same conditions;
 - (b) 'subsidiary' shall mean that company the capital of which includes the holding referred to in (a).
2. By way of derogation from paragraph 1, Member States shall have the option of:
 - replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,
 - not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

Article 4

1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:
 - refrain from taxing such profits, or
 - tax such profits while authorizing the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5 % of the profits distributed by the subsidiary.

3. Paragraph 1 shall apply until the date of effective entry into force of a common system of company taxation.

The Council shall at the appropriate time adopt the rules to apply after the date referred to in the first subparagraph.

Article 5

1. Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25 % of the capital of the subsidiary, be exempt from withholding tax.
2. Notwithstanding paragraph 1, the Hellenic Republic may, for so long as it does not charge corporation tax on distributed profits, levy a withholding tax on profits distributed to parent companies of other Member States. However, the rate of that withholding tax must not exceed the rate provided for in bilateral double-taxation agreements.
3. Notwithstanding paragraph 1, the Federal Republic of Germany may, for as long as it charges corporation tax on distributed profits at a rate at least 11 points lower than the rate applicable to retained profits, and at the latest until mid-1996, impose a compensatory withholding tax of 5 % on profits distributed by its subsidiary companies.
4. Notwithstanding paragraph 1, the Portuguese Republic may levy a withholding tax on profits distributed by its subsidiaries to parent companies of other Member States until a date not later than the end of the eighth year following the date of application of this Directive.

Subject to the existing bilateral agreements concluded between Portugal and a Member State, the rate of this withholding tax may not exceed 15 % during the first five years and 10 % during the last three years of that period.

Before the end of the eighth year the Council shall decide unanimously, on a proposal from the Commission, on a possible extension of the provisions of this paragraph.

Article 6

The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

Article 7

1. The term 'withholding tax' as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.

2. This Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them

to comply with this Directive before 1 January 1992. They shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of domestic law which they adopt in the field covered by this Directive are communicated to the Commission.

Article 9

This Directive is addressed to the Member States.

Done at Brussels, 23 July 1990.

For the Council

The President

G. CARLI

ANNEX

List of companies referred to in Article 2 (a)

- (a) companies under Belgian law known as 'société anonyme' / 'naamloze vennootschap', 'société en commandite par actions' / 'commanditaire vennootschap op aandelen', 'société privée à responsabilité limitée' / 'besloten vennootschap met beperkte aansprakelijkheid' and those public law bodies that operate under private law;
 - (b) companies under Danish law known as: 'aktieselskab', 'anpartsselskab';
 - (c) companies under German law known as: 'Aktiengesellschaft', 'Kommanditgesellschaft auf Aktien', 'Gesellschaft mit beschränkter Haftung', 'bergrechtliche Gewerkschaft';
 - (d) companies under Greek law known as: 'ανώνυμη εταιρία';
 - (e) companies under Spanish law known as: 'sociedad anónima', 'sociedad comanditaria por acciones', 'sociedad de responsabilidad limitada' and those public law bodies which operate under private law;
 - (f) companies under French law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée' and industrial and commercial public establishments and undertakings;
 - (g) the companies in Irish law known as public companies limited by shares or by guarantee, private companies limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts or building societies registered under the Building Societies Acts;
 - (h) companies under Italian law known as 'società per azioni', 'società in accomandita per azioni', 'società a responsabilità limitata', and public and private entities carrying on industrial and commercial activities;
 - (i) companies under Luxembourg law known as 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée';
 - (j) companies under Dutch law known as: 'naamloze vennootschap', 'besloten vennootschap met beperkte aansprakelijkheid';
 - (k) commercial companies or civil law companies having a commercial form cooperatives and public undertakings incorporated in accordance with Portuguese law;
 - (l) companies incorporated under the law of the United Kingdom.
-

CONVENTION

on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

(90/463/EEC)

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

DESIRING to give effect to Article 220 of that Treaty, by virtue of which they have undertaken to enter into negotiations with one another with a view to securing for the benefit of their nationals the elimination of double taxation,

CONSIDERING the importance attached to the elimination of double taxation in connection with the adjustment of profits of associated enterprises,

HAVE DECIDED to conclude this Convention, and to this end have designated as their Plenipotentiaries:

HIS MAJESTY THE KING OF THE BELGIANS:

Philippe de SCHOUTHEETE de Tervarent,
Ambassador Extraordinary and Plenipotentiary;

HER MAJESTY THE QUEEN OF DENMARK:

Niels Helveg Petersen,
Minister for Economic Affairs;

THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY:

Theo Waigel,
Federal Minister for Finance;

Jürgen Trumpf,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF THE HELLENIC REPUBLIC:

Ioannis Palaiokrassas,
Minister for Finance;

HIS MAJESTY THE KING OF SPAIN:

Carlos Solchaga Catalán,
Minister for Economic Affairs and Finance;

THE PRESIDENT OF THE FRENCH REPUBLIC:

Jean Vidal,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF IRELAND:

Albert Reynolds,
Minister for Finance;

THE PRESIDENT OF THE ITALIAN REPUBLIC:

Stefano De Luca,
State Secretary for Finance;

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBOURG:

Jean-Claude Juncker,
Minister for the Budget, Minister for Finance, Minister for Labour;

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

P.C. NIEMAN,
Ambassador Extraordinary and Plenipotentiary;

THE PRESIDENT OF THE PORTUGUESE REPUBLIC:

Miguel BELEZA,
Minister for Finance;

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

David H.A. HANNAY KCMG,
Ambassador Extraordinary and Plenipotentiary;

WHO, meeting within the Council and having exchanged their Full Powers, found in good and due form,

HAVE AGREED AS FOLLOWS:

CHAPTER I

SCOPE OF THE CONVENTION

Article 1

1. This Convention shall apply where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed.

2. For the purposes of this Convention, the permanent establishment of an enterprise of a Contracting State situated in another Contracting State shall be deemed to be an enterprise of the State in which it is situated.

3. Paragraph 1 shall also apply where any of the enterprises concerned have made losses rather than profits.

Article 2

1. This Convention shall apply to taxes on income.

2. The existing taxes to which this Convention shall apply are, in particular the following:

(a) in Belgium:

- impôt des personnes physiques/personenbelasting,
- impôt des sociétés/vennootschapsbelasting,
- impôt des personnes morales/rechtspersonenbelasting,
- impôt des non-résidents/belasting der niet-verblijfhouders,
- taxe communale et la taxe d'agglomération additionnelles à l'impôt des personnes physiques/aanvullende gemeentebelasting en agglomeratiebelasting op de personenbelasting;

(b) in Denmark:

- selskabsskat,
- indkomstskat til staten,
- kommunale indkomstskat,
- amtskommunal indkomstskat,
- særlig indkomstskat,
- kirkeskat,
- udbytteskat,
- renteskat,
- royaltyskat,
- frigørelsesafgift;

(c) in the Federal Republic of Germany:

- Einkommensteuer,
- Körperschaftsteuer,
- Gewerbesteuer, in so far as this tax is based on trading profits;

(d) in Greece:

- φόρος εισοδήματος φυσικών προσώπων,
- φόρος εισοδήματος νομικών προσώπων,
- εισφορά υπέρ των επιχειρήσεων ύδρευσης και αποχέτευσης;

(e) in Spain:

- impuesto sobre la renta de las personas físicas,
- impuesto sobre sociedades;

(f) in France:

- impôt sur le revenu,
- impôt sur les sociétés;

(g) in Ireland:

- Income Tax,
- Corporation Tax;

- (h) in Italy:
- imposta sul reddito delle persone fisiche,
 - imposta sul reddito delle persone giuridiche,
 - imposta locale sui redditi;
- (i) in Luxembourg:
- impôt sur le revenu des personnes physiques,
 - impôt sur le revenu des collectivités,
 - impôt commercial, in so far as this tax is based on trading profits;
- (j) in the Netherlands:
- inkomstenbelasting,
 - vennootschapsbelasting;
- (k) in Portugal:
- imposto sobre o rendimento das pessoas singulares,
 - imposto sobre o rendimento das pessoas colectivas,
 - derrama para os municípios sobre o imposto sobre o rendimento das pessoas colectivas;
- (l) in the United Kingdom:
- Income Tax,
 - Corporation Tax.
3. The Convention shall also apply to any identical or similar taxes which are imposed after the date of signature thereof in addition to, or in place of existing taxes. The competent authorities of the Contracting States shall inform each other of any changes made in the respective domestic laws.
- in the Federal Republic of Germany:
Der Bundesminister der Finanzen or an authorized representative,
- in Greece:
Ο Υπουργός των Οικονομικών or an authorized representative,
- in Spain:
El Ministro de Economía y Hacienda or an authorized representative,
- in France:
Le Ministre chargé du budget or an authorized representative,
- in Ireland:
The Revenue Commissioners or an authorized representative,
- in Italy:
Il Ministro delle Finanze or an authorized representative,
- in Luxembourg:
Le Ministre des Finances or an authorized representative,
- in the Netherlands:
De Minister van Financiën or an authorized representative,
- in Portugal:
O Ministro das Finanças or an authorized representative,
- in the United Kingdom:
The Commissioners of Inland Revenue or an authorized representative.

CHAPTER II

GENERAL PROVISIONS

Section I

Definitions

Article 3

1. For the purposes of this Convention: 'competent authority' shall mean:

- in Belgium:
De Minister van Financiën or an authorized representative,
Le Ministre des Finances or an authorized representative,
- in Denmark:
Skatteministeren or an authorized representative,

2. Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned.

Section II

Principles applying to the adjustment of profits of associated enterprises and to the attribution of profits to permanent establishments

Article 4

The following principles shall be observed in the application of this Convention:

1. Where:
- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State,
- or

- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where an enterprise of a Contracting State carries on business in another Contracting State through a permanent establishment situated therein, there shall be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

Article 5

Where a Contracting State intends to adjust the profits of an enterprise in accordance with the principles set out in Article 4, it shall inform the enterprise of the intended action in due time and give it the opportunity to inform the other enterprise so as to give that other enterprise the opportunity to inform in turn the other Contracting State.

However, the Contracting State providing such information shall not be prevented from making the proposed adjustment.

If after such information has been given the two enterprises and the other Contracting State agree to the adjustment, Articles 6 and 7 shall not apply.

Section 3

Mutual agreement and arbitration procedure

Article 6

1. Where an enterprise considers that, in any case to which this Convention applies, the principles set out in Article 4 have not been observed, it may, irrespective of the remedies provided by the domestic law of the Contracting States concerned, present its case to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. The case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1.

The enterprise shall at the same time notify the competent authority if other Contracting States may be concerned in the case. The competent authority shall then without delay notify the competent authorities of those other Contracting States.

2. If the complaint appears to it to be well-founded and if it is not itself able to arrive at a satisfactory solution, the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of any other Contracting State concerned, with a view to the elimination of double taxation on the basis of the principles set out in Article 4. Any mutual agreement reached shall be implemented irrespective of any time limits prescribed by the domestic laws of the Contracting States concerned.

Article 7

1. If the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6 (1), they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question.

Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in the first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given.

2. The submission of the case to the advisory commission shall not prevent a Contracting State from initiating continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters.
3. Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered. This provision shall not affect the appeal if and in so far as it relates to matters other than those referred to in Article 6.

4. The competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1.

5. In so far as the provisions of paragraphs 1 to 4 are not applied, the rights of each of the associated enterprises, as laid down in Article 6, shall be unaffected.

Article 8

1. The competent authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or

to set up the advisory commission referred to in Article 7 where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits under Article 4 one of the enterprises concerned is liable to a serious penalty.

2. Where judicial or administrative proceedings, initiated with a view to a ruling that by actions giving rise to an adjustment of profits under Article 4 one of the enterprises concerned was liable to a serious penalty, are being conducted simultaneously with any of the proceedings referred to in Articles 6 and 7, the competent authorities may stay the latter proceedings until the judicial or administrative proceedings have been concluded.

Article 9

1. The advisory commission referred to in Article 7 (1) shall consist of, in addition to its Chairman:

- two representatives of each competent authority concerned; this number may be reduced to one by agreement between the competent authorities,
- an even number of independent persons of standing to be appointed by mutual agreement from the list of persons referred to in paragraph 4 or, in the absence of agreement, by the drawing of lots by the competent authorities concerned.

2. When the independent persons of standing are appointed an alternate shall be appointed for each of them according to the rules for the appointment of the independent persons in case the independent persons are prevented from carrying out their duties.

3. Where lots are drawn, each of the competent authorities may object to the appointment of any particular independent person of standing in any circumstance agreed in advance between the competent authorities concerned or in one of the following situations:

- where that person belongs to or is working on behalf of one of the tax administrations concerned,
- where that person has, or has had, a large holding in or is or has been an employee of or adviser to one or each of the associated enterprises,
- where that person does not offer a sufficient guarantee of objectivity for the settlement of the case or cases to be decided.

4. The list of independent persons of standing shall consist of all the independent persons nominated by the Contracting States. For this purpose each Contracting State shall nominate five persons and shall inform the Secretary-General of the Council of the European Communities thereof.

Such persons must be nationals of a Contracting State and resident within the territory to which this Convention applies. They must be competent and independent.

The Contracting States may make alterations to the list referred to in the first subparagraph; they shall inform the Secretary-General of the Council of the European Communities thereof without delay.

5. The representatives and independent persons of standing appointed in accordance with paragraph 1 shall elect a Chairman from among those persons of standing on the list referred to in paragraph 4, without prejudice to the right of each competent authority concerned to object to the appointment of the person of standing thus chosen in one of the situations referred to in paragraph 3.

The Chairman must possess the qualifications required for appointment to the highest judicial offices in his country or be a jurisconsult of recognized competence.

6. The members of the advisory commission shall keep secret all matters which they learn as a result of the proceedings. The Contracting States shall adopt appropriate provisions to penalize any breach of secrecy obligations. They shall, without delay inform the Commission of the European Communities of the measures taken. The Commission of the European Communities shall inform the other Contracting States.

7. The Contracting States shall take all necessary steps to ensure that the advisory commission meets without delay once cases are referred to it.

Article 10

1. For the purposes of the procedure referred to in Article 7, the associated enterprises concerned may provide any information, evidence or documents which seem to them likely to be of use to the advisory commission in reaching a decision. The enterprises and the competent authorities of the Contracting States concerned shall give effect to any request made by the advisory commission to provide information, evidence or documents. However, the competent authorities of any such Contracting State shall not be under any obligation:

- (a) to carry out administrative measures at variance with its domestic law or its normal administrative practice;
- (b) to supply information which is not obtainable under its domestic law or in its normal administrative practice; or
- (c) to supply information which would disclose any trade, business, industrial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

2. Each of the associated enterprises may, at its request, appear or be represented before the advisory commission. If

the advisory commission so requests, each of the associated enterprises shall appear or be represented before it.

Article 11

1. The advisory commission referred to in Article 7 shall deliver its opinion not more than six months from the date on which the matter was referred to it.

The advisory commission must base its opinion on Article 4.

2. The advisory commission shall adopt its opinion by a simple majority of its members. The competent authorities concerned may agree on additional rules of procedure.

3. The costs of the advisory commission procedure, other than those incurred by the associated enterprises, shall be shared equally by the Contracting States concerned.

Article 12

1. The competent authorities party to the procedure referred to in Article 7 shall, acting by common consent on the basis of Article 4, take a decision which will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion.

The competent authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach agreement, they shall be obliged to act in accordance with that opinion.

2. The competent authorities may agree to publish the decision referred to in paragraph 1, subject to the consent of the enterprises concerned.

Article 13

The fact that the decisions taken by the Contracting States, concerning the taxation of profits resulting from a transaction between associated enterprises, have become final shall not prevent recourse to the procedures set out in Articles 6 and 7.

Article 14

For the purposes of this Convention, the double taxation of profits shall be regarded as eliminated if either:

(a) the profits are included in the computation of taxable profits in one State only;

or

(b) the tax chargeable on those profits in one State is reduced by an amount equal to the tax chargeable on them in the other.

CHAPTER III

FINAL PROVISIONS

Article 15

Nothing in this Convention shall affect the fulfilment of wider obligations with respect to the elimination of double taxation in the case of an adjustment of profits of associated enterprises resulting either from other conventions to which the Contracting States are or will become parties or from the domestic law of the Contracting States.

Article 16

1. The territorial scope of this Convention shall be that defined in Article 227 (1) of the Treaty establishing the European Economic Community, without prejudice to paragraph 2 of this Article.

2. This Convention shall not apply to:

- the French territories referred to in Annex IV to the Treaty establishing the European Economic Community,
- the Faroe Islands and Greenland.

Article 17

This Convention will be ratified by the Contracting States. The instruments of ratification will be deposited at the office of the Secretary-General of the Council of the European Communities.

Article 18

This Convention shall enter into force on the first day of the third month following that in which the instrument of ratification is deposited by the last signatory State to take that step. The Convention shall apply to proceedings referred to in Article 6 (1) which are initiated after its entry into force.

Article 19

The Secretary-General of the Council of the European Communities shall inform the Contracting States of:

- (a) the deposit of each instrument of ratification;
- (b) the date on which this Convention will enter into force;
- (c) the list of independent persons of standing appointed by the Contracting States and any alterations thereto in accordance with Article 9 (4).

Article 20

This Convention is concluded for a period of five years. Six months before the expiry of that period, the Contracting

States will meet to decide on the extension of this Convention and any other relevant measure.

Article 21

Each Contracting State may, at any time, ask for a revision of this Convention. In that event, a conference to revise the Convention will be convened by the President of the Council of the European Communities.

Article 22

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all 10 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.

FINAL ACT

THE PLENIPOTENTIARIES OF THE HIGH CONTRACTING PARTIES,

meeting at Brussels, on the twenty-third day of July nineteen hundred and ninety, for the signature of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises,

have, on the occasion of signing the said Convention:

(a) adopted the following joint Declarations attached to the Final Act:

- Declaration on Article 4 (1),
- Declaration on Article 9 (6),
- Declaration on Article 13;

(b) taken note of the following unilateral Declarations attached to this Final Act:

- Declaration of France and the United Kingdom on Article 7,
- Individual Declarations of the Contracting States on Article 8,
- Declaration of the Federal Republic of Germany on Article 16.

En fe de lo cual, los abajo firmantes suscriben la presente Acta Final.

Til bekræftelse heraf har undertegnede underskrevet denne slutakt.

Zu Urkund dessen haben die Unterzeichneten ihre Unterschrift unter diese Schlußakte gesetzt.

Σε πίστωση των ανωτέρω, οι υπογράφοντες πληρεξούσιοι έθεσαν την υπογραφή τους κάτω από την παρούσα τελική πράξη.

In witness whereof, the undersigned have signed this Final Act.

En foi de quoi, les soussignés ont apposé leurs signatures au bas du présent acte final.

Dá fhianú sin, chuir na daoine thíos-sínithe a lámh leis an Ionstraim Chríochnaitheach seo.

In fede di che, i sottoscritti hanno apposto le loro firme in calce al presente atto finale.

Ten blijke waarvan de ondergetekenden hun handtekening onder deze Slotakte hebben gesteld.

Em fé do que os abaixo assinados apuseram as suas assinaturas no final do presente Acto Final.

Hecho en Bruselas, el veintitrés de julio de mil novecientos noventa.

Udfærdiget i Bruxelles, den treogtyvende juli nitten hundrede og halvfems.

Geschehen zu Brüssel am dreiundzwanzigsten Juli neunzehnhundertneunzig.

Έγινε στις Βρυξέλλες, στις είκοσι τρεις Ιουλίου χίλια εννιακόσια ενενήντα.

Done at Brussels on the twenty-third day of July in the year one thousand nine hundred and ninety.

Fait à Bruxelles, le vingt-trois juillet mil neuf cent quatre-vingt-dix.

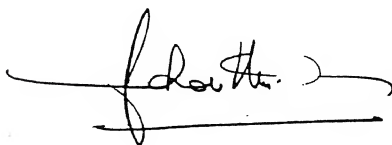
Arna dhéanamh sa Bhruiséil, an tríú lá fíchead de Iúil, míle naoi gcéad nócha.

Fatto a Bruxelles, addì ventitré luglio millenovecentonovanta.

Gedaan te Brussel, de drieëntwintigste juli negentienhonderd negentig.

Feito em Bruxelas, em vinte e três de Julho de mil novecentos e noventa.

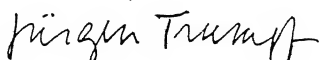
Pour Sa Majesté le Roi des Belges
Voor Zijne Majesteit de Koning der Belgen

A handwritten signature in black ink, appearing to be 'Philippe', with a long horizontal flourish extending to the right.

For Hendes Majestæt Danmarks Dronning

A handwritten signature in black ink, appearing to be 'Margrethe II', written in a cursive style.

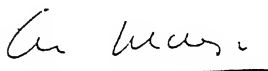
Für den Präsidenten der Bundesrepublik Deutschland

A handwritten signature in black ink, appearing to be 'Tilo Böttger', written in a cursive style.A handwritten signature in black ink, appearing to be 'Jürgen Trittgen', written in a cursive style.

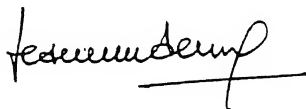
Για τον Πρόεδρο της Ελληνικής Δημοκρατίας



Por Su Majestad el Rey de España



Pour le président de la République française



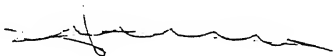
For the President of Ireland
Thar ceann Uachtarán na hÉireann



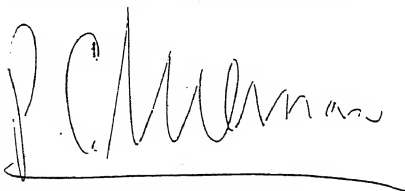
Per il presidente della Repubblica italiana



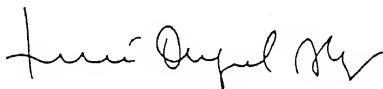
Pour Son Altesse Royale le Grand-Duc de Luxembourg



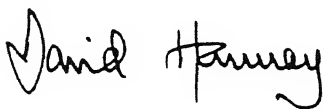
Voor Hare Majesteit de Koningin der Nederlanden



Pelo Presidente da República Portuguesa



For Her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland



JOINT DECLARATIONS

Declaration on Article 4 (1)

The provisions of Article 4 (1) shall cover both cases where a transaction is carried out directly between two legally distinct enterprises as well as cases where a transaction is carried out between one of the enterprises and the permanent establishment of the other enterprise situated in a third country.

Declaration on Article 9 (6)

The Member States shall be entirely free as regards the nature and scope of the appropriate provisions they adopt for penalizing any breach of secrecy obligations.

Declaration on Article 13

Where, in one or more of the Contracting States concerned, the decisions regarding the taxation giving rise to the procedures referred to in Articles 6 and 7 have been altered after the procedure referred to in Article 6 has been concluded or after the decision referred to in Article 12 has been taken and where double taxation within the meaning of Article 1 results, account being taken of the application of the outcome of that procedure or that decision, Articles 6 and 7 shall apply.

UNILATERAL DECLARATIONS

Declaration on Article 7

France and the United Kingdom declare that they will apply Article 7 (3).

Individual Declarations of the Contracting States on Article 8

Belgium

The term 'serious penalty' means a criminal or administrative penalty in cases:

- either of a common law offence committed with the aim of tax evasion,
- or infringements of the provisions of the Code of income tax or of decisions taken in implementation thereof, committed with fraudulent intention or with the intention of causing injury.

Denmark

The concept of 'serious penalty' means a penalty for the intentional infringement of provisions of the Criminal Law or of special legislation in cases which cannot be regulated by administrative means.

Cases of infringement of provisions of tax law may, as a general rule, be regulated by administrative means where it is considered that the infringement will not entail a punishment greater than a fine.

Germany

An infringement of the tax laws punishable by a 'serious penalty' is constituted by any infringement of the tax laws penalized by detention, criminal or administrative fines.

Greece

Under Greek legislation governing taxation, an undertaking is liable to 'severe penalties':

1. if it fails to submit declarations, or submits incorrect declarations, in respect of taxes, charges or contributions which must be withheld and paid to the State under existing provisions, or in respect of value added tax, turnover tax or the special tax on luxury goods, in so far as the total amount of the above taxes, charges and contributions which should have been declared and paid to the State as a result of trade or other activities carried out over a period of six months exceeds an amount of six hundred thousand (600 000) Greek drachmas or one million (1 000 000) Greek drachmas over a period of one calendar year;
2. if it fails to submit a declaration of income tax, in so far as the tax due in respect of the income not declared is more than three hundred thousand (300 000) Greek drachmas;
3. if it fails to supply the taxation details laid down in the Code on Taxation Data;

4. if it supplies details as referred to under the previous case 3, which are incorrect as regards quantity or unit price or value, in so far as the inaccuracy results in a discrepancy which exceeds ten per cent (10 %) of the total amount or of the total value of the goods, the provision of services or the trade generally;
5. if it fails to keep accurately the books and records required by the Code on Taxation Data, in so far as that inaccuracy has been noted in the course of a regular check, the findings of which have been confirmed either by administrative resolution of the discrepancy or because the period allowed for an appeal has expired or as a result of a definitive decision by an administrative tribunal, provided that during the management period checked the discrepancy between gross income and the income declared is more than twenty per cent (20 %) and in any case not less than one million (1 000 000) Greek drachmas;
6. if it fails to observe the obligation to keep books and records as laid down in the relevant provisions of the Code on Taxation Data;
7. if it issues false or fictitious — or itself falsifies — invoices for the sale of goods or the supply of services or any other taxation details as referred to in case 3 above.

A taxation document is regarded as false if it has been perforated or stamped in any way without the proper authentication having been entered in the relevant books of the competent tax authority, in so far as failure to make such an entry has occurred in the knowledge that such authentication is required for the taxation document. A taxation document is also regarded as false if the content and other details of the original or the copy differ from those which are recorded on the counterfoil of that document.

A taxation document is regarded as fictitious if it has been issued for a transaction or part of a transaction, transfer or any other reason not recorded in the total or for a transaction carried out by persons different from those recorded in the taxation document;

8. if it is aware of the intention of the action taken and collaborates in any way in the production of false taxation documents or is aware that the documents are false or fictitious and collaborates in any way in their issue or accepts the false, fictitious or falsified taxation documents with the intention of concealing material relevant to taxation.

Spain

The term 'serious penalties' includes administrative penalties for serious tax infringements, as well as criminal penalties for offences committed with respect to the taxation authorities.

France

The term 'serious penalties' includes criminal penalties and tax penalties such as penalties for failure to make a tax return after receiving a summons, for lack of good faith, for fraudulent practices, for opposition to tax inspection, for secret payments or distribution, or for abuse of rights.

Ireland

'Serious penalties' shall include penalties for:

- (a) failing to make a return;
- (b) fraudulently or negligently making an incorrect return;
- (c) failing to keep proper records;
- (d) failing to make documents and records available for inspection;
- (e) obstructing persons exercising statutory powers;
- (f) failing to notify chargeability to tax;
- (g) making a false statement to obtain an allowance.

The legislative provisions governing these offences, as at 3 July 1990, are as follows:

- Part XXXV of the Income Tax Act, 1967,
- Section 6 of the Finance Act, 1968,
- Part XIV of the Corporation Tax Act, 1976,
- Section 94 of the Finance Act, 1983.

Any subsequent provisions replacing, amending or updating the penalty code would also be comprehended.

Italy

The term 'serious penalties' means penalties laid down for illicit acts, within the meaning of the domestic law, constituting a tax offence.

Luxembourg

Luxembourg considers to be a 'serious penalty' what the other Contracting State considers to be so for the purposes of Article 8.

Netherlands

The term 'serious penalty' means a penalty imposed by a judge for any action, committed intentionally, which is mentioned in Article 68 of the General Law on taxation.

Portugal

The terms 'serious penalties' include criminal penalties as well as the further tax penalties applicable to infringements committed with intent to defraud or in which the fine applicable is of an amount exceeding 1 000 000 (one million) Portuguese escudos.

United Kingdom

The United Kingdom will interpret the term 'serious penalty' as comprising criminal sanctions and administrative sanctions in respect of the fraudulent or negligent delivery of incorrect accounts, claims or returns for tax purposes.

Declaration by the Federal Republic of Germany on Article 16

The Government of the Federal Republic of Germany reserves the right to declare, when lodging its instrument of ratification that the Convention also applies to Land of Berlin.
